IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Madan Singh. Versus Kanwar Lal Joshi.

S.B. Criminal Misc. Petition No. 386/2006
against the order dated 27-2-2006 passed
by the Judicial Magistrate, Rawatbhata, in
Criminal Case No. 41/2005.

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Date of Order: August 23, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. Umesh Shrimali, for the petitioner.
Mr. Sudhir Sarswat, for the non-petitioner.

BY THE COURT:

By the instant criminal miscellaneous petition under Section 482 Cr.P.C., the petitioner has challenged the order dated 27-2-2006 passed by the Judicial Magistrate, Rawatbhata (for short, "the trial Court" hereinafter) in Criminal Case No. 41/2005, whereby the trial Court dismissed the application filed by the petitioner for withdrawal of the criminal proceedings against him.

I have heard learned counsel for the parties and carefully gone through the order impugned.

It is contended by the learned counsel for the petitioner that the trial Court has erred in law and on facts in

taking cognizance on the complaint at a pre-mature stage as there is no compliance of the provision of Section 138 of the Negotiable Instruments Act, 1881.

The facts of the case, in a succinct, are that on 17.2.2005, the complainant/non-petitioner filed a complaint against the petitioner under Section 138 of the Negotiable Instrument Act, 1881 (for short, "the Act" hereinafter) alleging therein that the petitioner gave Cheque No. CA/2002/GK/548903 dated 18-1-2005 drawn on the Bank of Baroda, Jhalar Bawri Branch to him, which, on being presented to the bank on 25-1-2005, was dishonoured with the endorsement of "insufficient funds and an intimation to this effect was given to the non-petitioner by the Branch Manager of S.B.B.J., Rawatbhata on 27.1.2005. A legal notice was given by the complainant/non-petitioner to the petitioner on 1-2-2005, which was served on the petitioner on 8-2-2005 and the complaint was filed on 17-2-2005.

Section 138 of the Act reads as under:-

> **"138. Dishonour of cheque for insufficiency, etc., of funds in the account.-**
> Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with

> that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless-
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him for the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

The cause of action under the proviso (b) and (c) of Section 138 of the Act for filing complaint cannot be said to arise merely on the cheque being dishonoured but will arise only after giving of notice of demand of the amount of the cheque by payee or holder in due course of the cheque to the drawer of the cheque and coupled with the failure of the drawer of the cheque to pay that amount within 15 days of the date of service/receipt of notice on or by him. In G. Ravi Kumar Vs. Ravindranath,

(1998) 1 Crimes 86 (A.P.), the Andhra Pradesh High Court held as under:-

> "The cause of action for initiating proceedings under Section 138 of the Negotiable Instrument Act would arise only after expiry of 15 days of receipt of notice by drawer and not from the date of return of said notice without being served on drawer of cheque."

In Shakti Travels & Tours Vs. State of Bihar & Anr., (2002) 9 SCC 415, Hon'ble Supreme Court has held as under:-

> Undoubtedly, the accused has a right to pay the money within 15 days from the date of service of notice and only when he fails to pay, it is open for the complainant to file a case under Section 138 of the Negotiable Instruments Act, 1881. That being the position and in the complaint itself having not been mentioned that the notice has been served, on the assertion made in paragraph 8 of the complaint, the complaint itself is not maintainable."

A perusal of the facts on record shows that the cheque was issued by the petitioner in favour of the complainant/non-petitioner was dishonoured by the bank, upon which a legal notice was sent by the complainant/non-petitioner to the petitioner on 1-2-2005 which was received by the petitioner on 8-2-2005. The complaint was filed on 17-2-2005 i.e. prior to expiry of statutory period of 15 days and the petitioner was not provided the statutory opportunity provided under Sections 138 (c) and Section 142 (b) of the Act.

For initiating proceedings under Section 138 of the Act, as per proviso (c) thereto, the drawer of such cheque must

fail to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the notice. The cause of action for initiating proceedings under Section 138 of the Act arises only after expiry of 15 days of receipt of notice by the drawer and not from the date of the notice. Therefore, the complaint was pre-mature and in such an eventuality, the trial court ought to have returned the complaint for filing the same on accruing the cause of action, or should have waited till maturity of the notice period, as held by the Hon'ble Supreme Court in Narsingh Das Tapadia Vs. Goverdhan Das Partani & Anr., (2000) 7 SCC 183, wherein the Apex Court held that mere presentation of the complaint in the court cannot be held to mean that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an early date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed. However, in the instant case, the trial court neither returned the pre-mature complaint, nor awaited maturity and, therefore, the order impugned taking cognizance is liable to be set-aside.

Consequently, all the criminal miscellaneous petition is allowed. The impugned orders dated 27-2-2006 passed by

the learned trial court is hereby set-aside and the matter is remanded to the trial Court for passing order of cognizance afresh after expiry of the notice period in the light of the law laid down by the Hon'ble Supreme Court in Narsingh Das Tapadia's case (supra).

(H.R. PANWAR), J.

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